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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 87

WILLIAM D. FRAD, PETITIONER

v.

JOHN J. KELLY, UNITED STATES MARSHAL FOR THE SOUTHERN DISTRICT OF NEW YORK, UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court appears at R. 129–131. The opinion of the Circuit Court of Appeals (R. 151–155) is reported in 89 F. (2d) 866.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 17, 1937 (R. 155–156). The petition for a writ of certiorari was filed May 27, 1937, and granted June 1, 1937 (R. 157). The jurisdic-

tion of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether a trial court may suspend imposition of sentences on pleas of guilty to two indictments and place the defendant on probation to take effect after service of a sentence of imprisonment on a third indictment.

2. Whether the district judge, appointed in another district but assigned and designated to sit in the trial district, who suspended imposition of sentence and granted probation, has the power, after returning to his own district and after his designation has expired, to discharge the probationer from further custody and to terminate the proceedings.

3. Whether the order discharging petitioner from further supervision, assuming validity of the order, released petitioner from the jurisdiction of the district court to impose sentences on the two indictments on which sentence was suspended.

4. Whether a judge of the trial district now has power, on motion of the United States Attorney, to revoke probation if the facts warrant it and to impose sentence on the two indictments on which imposition of sentence was suspended.

STATUTES AND TABLE INVOLVED

The pertinent statutes are printed in the Appendix to the Petitioner's brief. The table of types of sentences referred to in this brief is printed in the Appendix, pp. 30–31.

STATEMENT

On March 7, 1934, in the District Court for the Southern District of New York, the petitioner entered a plea of not guilty (R. 19) to an indictment, C–96–120 (R. 15) charging impersonation when entering the United States (U. S. C., Title 8, Sec. 220 (b)). Prior to that time, on February 6, and February 28 of the same year, he had entered similar pleas (R. 8, 13) to two other indictments, C–80–944 (R. 4) and C–96–116 (R. 9), which charged the use of passports obtained by false statements as to identity (U. S. C., Title 22, Secs. 220, 221) and conspiracy to violate laws of the United States (U. S. C., Title 18, Sec. 88).

On March 21, 1934, these pleas were withdrawn and pleas of guilty entered to all three indictments (R. 8, 13, 19) before District Judge Inch of the Eastern District of New York, who by special assignment was then sitting in the Southern District. On March 26, 1934, on indictment C–96–116 he imposed a sentence of two years imprisonment and a fine of $1,000 (R. 14), but suspended imposition of sentence on the other two indictments and placed the petitioner on probation for a period of

four years to begin after service of the two-year term on the first indictment (R. 8, 19).

On November 7, 1935, the petitioner was discharged from the penitentiary in which he served the sentence on the first indictment (R. 38) and entered on his term of probation on November 15, 1935 (R. 25–26). On December 16, 1935, Judge Inch, having returned to his home district, considered at his chambers in the Eastern District an application of the petitioner requesting termination of probation, and there signed an order as follows (R. 29):

> *Ordered*, That the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated.

This order bore the caption "United States District Court, Southern District of New York," but it appears both from the notice of the motion for the order (R. 27) and from a subsequent hearing on a motion to vacate such order (R. 42, 44) that the order was made in the Eastern District. This fact was recognized by the court below (R. 152) and is admitted by the petitioner (Br., p. 5).

On November 20, 1936, an order for issuance of a warrant was signed by a judge of the Southern

District of New York to apprehend the petitioner for violation of terms of his probation and charging him with larceny by trick on the high seas (R. 32). He was arrested and a motion was made to vacate the order of December 16, 1935, which purported to terminate probation (R. 35, 42). Judge Inch returned to the Southern District of New York to hear this motion by stipulation of counsel. No order was entered on this motion, inasmuch as the petitioner had, in the meantime, petitioned for a writ of habeas corpus (R. 66), and the United States Attorney had moved before a judge sitting in the Southern District of New York for sentence on the two indictments under which probation had been granted (R. 40, 125). The Marshal filed a return to the writ (R. 74) and petitioner traversed the return (R. 77). The Government's motion to sentence the petitioner, and the latter's petition for a writ of habeas corpus, were considered together by District Judge Bondy, of the Southern District of New York. He denied the Government's motion and sustained the writ (R. 129-131, 133, 137). Upon appeal, the Circuit Court of Appeals for the Second Circuit reversed both orders and remanded the petitioner "for consideration of the revocation of his probation and for sentence if warranted" (R. 155). This Court granted certiorari (R. 157).

SUMMARY OF ARGUMENT

The order suspending imposition of sentence on the two indictments and granting probation to be-

gin at expiration of sentence of imprisonment on the third indictment is valid. Nothing in the language or purpose of the Probation Act prohibits this practice which is used generally by the district courts and achieves the required flexible administration of the Probation Act.

The assigned judge who granted probation had no jurisdiction, after his designation expired and he returned to his own district, to revoke the order of probation and discharge the petitioner from the jurisdiction of the trial court under the Probation Act. Discharge of the probationer was a new proceeding wholly different from the proceeding in which probation was granted and was not a matter submitted to the assigned judge in the trial district.

Assuming, *arguendo,* the jurisdiction of the trial judge to revoke the probation he had granted, the order of revocation would not release the probationer from the jurisdiction of the trial court.

Even assuming that the order of probation is invalid, it was the duty of the district court to impose sentences on the second and third indictments upon which imposition of sentences had been suspended.

ARGUMENT

The court below held that the order of probation was valid, and that the assigned judge who made the order of probation had no power, after his designation expired and he returned to his own district, to discharge the petitioner from further

supervision. Therefore, the judgment of the court below reversed the order sustaining the petitioner's writ of habeas corpus and also reversed the order denying the Government's motion to revoke probation and to impose sentences on the second and third indictments and remanded the petitioner to custody for consideration of revocation of probation and sentence if wararnted (R. 155).

The petition for a writ of certiorari (p. 13) specified as error the reversal of both orders of the district court by the court below. The petitioner contends in his brief that the assigned judge, even after he returned to his own district and after his designation expired, retained the power under the Probation Act to discharge the respondent from further supervision. The petitioner also contends in his brief that the trial court retains no power to impose sentences on the second and third indictments at the present time because the sentence on the first indictment has been served.

Determination of whether the court below correctly held that probation may be revoked at the present time and sentences imposed on the second and third indictments requires a decision on the validity of the order of probation. If valid, the power of the assigned judge, after his designation expired and he returned to his own district, to discharge the petitioner from further supervision under the Probation Act must be determined. If the order of probation is not valid, the power and

duty of the trial court at the present time to impose sentences on the second and third indictments must be determined. This last question should also be determined even if the order of probation is valid, because if probation is revoked for violation of its conditions on the application which the Government has made, the power to impose sentences on the second and third indictments must be determined.

I

THE ORDER SUSPENDING IMPOSITION OF SENTENCES ON THE SECOND AND THIRD INDICTMENTS AND GRANTING PROBATION TO BEGIN AFTER SERVING THE SENTENCE IMPOSED ON THE FIRST INDICTMENT WAS VALID

The words as well as the ends and aims of the Probation Act, in which are found its meaning, *Escoe* v. *Zerbst,* 295 U. S. 490, 493, support the conclusion that the trial court has power to suspend imposition of sentence on one indictment and to grant probation to begin after serving sentence on another indictment.

1. The language of the Act grants a broad discretion and authority to the trial court. *Burns* v. *United States,* 287 U. S. 216, 220–221. Section 1 provides that when it shall appear to the trial court's "satisfaction" that the "ends of justice" and the "*best interests*" *of the* public and the defendant will be served thereby, the power exists, after conviction or a plea of guilty or *nolo contendere* for any offense not punishable by death or life imprisonment, to suspend either imposition or

execution of sentence and to place the defendant on probation "for such period and upon such terms and conditions" as the trial court "may deem best"; or the court may impose a fine and may also place the defendant upon probation. The court may revoke or modify any condition of probation, provided the entire period of probation is not more than five years.

Section 2 provides that, even after the expiration of the probation period but within the maximum time for which the defendant might have been sentenced originally, the suspension of sentence may be revoked and any sentence may be imposed which originally might have been imposed.

Language better calculated to grant broad discretion and authority could not have been chosen. The only limitations in the language granting the power of probation are that it shall not apply to offenses punishable by death or life imprisonment and that the period of probation shall not exceed five years. The power to suspend sentence and to grant probation to begin after serving sentence on another indictment is not prohibited by the words of the Act. It is within the broad terms granting power to place the defendant on probation "for such period and upon such terms and conditions" as the trial court deems best. It should be held to be included in the grant of power unless the history and purpose of the Act forbid giving the words used their natural and usual broad meaning

2. The history and purpose of the Probation Act support this interpretation. Prior to the Probation Act of 1925, the only amelioration of punishment for a Federal crime was a Presidential pardon, commutation of sentence for good behavior, Act of June 21, 1902, c. 1140, Sec. 1, 32 Stat. 397 (18 U. S. C., Sec. 710), parole, Act of June 25, 1910, c. 387, Sec. 1, 36 Stat. 819, as amended by the Act of January 23, 1913, c. 9, 37 Stat. 650 (18 U. S. C., Sec. 714), and the practice of suspending sentence. Executive clemency is exercised only in the most exceptional case and parole does not operate until the prisoner has served one-third of his total sentence.

The need for a probation system, and the example of the beneficial operation of probation systems under the laws of the States, were the cause, at least in part, for the practice of suspending sentence permanently in some Federal trial courts and committing the defendant to the supervision of state probation officers or volunteers. *United States* v. *Murray*, 275 U. S. 347, 354. In 1916, this Court held in *Ex parte United States*, 242 U. S. 27, that Federal trial courts had no power to suspend sentences indefinitely. That decision and the need for a probation system resulted in the enactment of the present Probation Act.[1]

[1] The Annual Report of the Attorney General for the fiscal year ended June 30, 1936, page 220, Table 9G, shows the growth of probation from 4,281 probationers under supervision on July 1, 1930, to 22,027 on July 1, 1936. Table 8D of that report, page 206, discloses that 2,011 parolees and 1,578 conditional releasees were under supervision on July 1, 1936.

The purpose of the Probation Act is the rehabilitation of offenders. In *Burns* v. *United States*, 287 U. S. 216, this Court stated, at p. 220:

> To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. * *. *

The purpose of the statute is achieved by the practice followed in the present case. The trial court, in the exercise of the broad discretion to individualize each case and the particular situation of each offender, may use this method of sentence to accomplish a supervision over the offender which would not be accomplished either by parole alone or probation alone on concurrent or consecutive sentences or by probation on one sentence concurrent with imprisonment upon another sentence.

The usefulness of this method of administering the Probation Act is strikingly disclosed by a consideration of the type of sentence pronounced in Federal criminal cases during the last Government fiscal year from July 1, 1936, to June 30, 1937. A table which has been prepared for the Annual Report of the Attorney General for that year and is found in the Appendix, pp. 30–31, contains this information. It appears that suspended sentences and probation in some form were granted in 15,597

cases or 37.1% of the total of 41,961 cases of sentences. Probation was granted in conjunction with imprisonment and fine, as in the present case, in 2,373 or 15.2% of the 15,597 cases in which some form of probation was granted or 5.7% of the total of 41,961 cases. In 3,976 cases probation was granted in conjunction with imprisonment alone, and in 943 cases with a fine only. In 8,305 cases probation was granted without either imprisonment or fine. It appears from these figures that the trial courts, in the exercise of their discretion under the Probation Act, frequently utilize the method of sentence involved here which has the approval of their experience.

It is noted that Immigration Act violations, which are involved in one indictment of the present case on which probation was granted (R. 19), constitute the one class of offenses in which probation was granted in conjunction with other punishment in more cases, 1,217 cases, than probation was granted alone, 288 cases, without any other sentence.

3. The Probation Act is a remedial statute which should receive a distinctly benevolent interpretation to accomplish its purpose. *Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d). The history of the Act discloses that its purpose in part was to permit trial courts to continue the practice of suspending sentence which prevailed before *Ex parte United States,* 242 U. S. 27. Although the extent

of the practice of suspending sentences is not reflected in numerous judicial decisions, *Ex parte United States*, 242 U. S. 27, 50–51, at least one instance may be noted in which a trial court suspended imposition of a sentence to begin at the expiration of another sentence. *United States* v. *Blaisdell*, 3 Benedict 132, 145, Fed. Cas. No. 14608 (S. D. N. Y.). This instance furnishes some evidence that it was the practice to suspend sentence in this manner. The Act granted the power to continue the practice of suspending sentence and in the absence of any words of limitation it may be supposed that Congress intended the power to be exercised in this respect in the same manner as before the statute.

4. The weight of judicial authority supports this interpretation. In *Burns* v. *United States*, 287 U. S. 216, although this Court did not expressly consider the power to grant probation on one count to run concurrently with a sentence of imprisonment on another count, which was involved there, it was held that a summary proceeding to revoke that probation for misconduct was valid and that upon the facts no abuse of discretion appeared. This decision on the revocation of probation in these circumstances assumed, if it does not decide, that the trial court had the power to impose a sentence of this character. If such a suspended sentence, with probation on one count to run concurrently with a sentence of imprisonment on another

count, is proper, suspension of sentence and probation to begin at the expiration of another sentence is permitted by the Probation Act.

In addition to the decision of the court below in the present case which involves separate indictments, the suspension of sentence on one count of an indictment with probation to begin at the expiration of sentence on another count has been approved in *White* v. *Steigleder,* 37 F. (2d) 858 (C. C. A. 10th) and *Deliz* v. *Rexroad,* 18 F. Supp. 362 (M. D. Pa.).

5. The only contrary view is expressed by *United States* v. *Greenhaus,* 85 F. (2d) 116 (C. C. A. 2d), certiorari, sought on behalf of the defendant, denied, 299 U. S. 596. The expression of this view, however, admitted by the court to be unnecessary to its decision, is unsatisfactory in reasoning, misapplies *United States* v. *Murray,* 275 U. S. 347, and is substantially contrary to the same court's holding in the present case. In the *Greenhaus* case the defendant was sentenced to imprisonment for five years on the even numbered counts of a mail fraud indictment with sentence to begin at the expiration of sentence for three years on the odd numbered counts and to be suspended and the defendant placed on probation. While the defendant was at large on probation after service of the prison term on the odd numbered counts, probation was revoked for violation of its conditions, and the defendant was ordered to serve the sentence on the even numbered counts. On appeal

from the order of revocation the defendant contended that the sentence on the even numbered counts, as well as the suspension of that sentence, was void. The Second Circuit Court of Appeals affirmed the order revoking probation and committing the defendant to imprisonment, and held that the original sentence was valid and must be served. The court then went beyond the decision required by the appeal and, deeming it "important to determine the powers of the courts to suspend sentences and admit to probation in future cases", expressed the view that the suspension of sentence was unlawful because of the reasoning of this Court in *United States* v. *Murray, supra.*

The Circuit Court of Appeals stated that the reasoning of the *Murray* case settled the law that probation cannot be conditional upon the serving of a prior portion of a sentence and then stated that sentences on separate counts of an indictment constituted one sentence under the Probation Act. The *Murray* case, however, held only that immediately upon imprisonment to serve the sentence the trial court lost power to grant probation, and did not hold that before imprisonment the court had no power under the Probation Act to provide for probation to begin after service of part of the sentence. It has been held, distinguishing the *Murray* case on this ground, that a trial court has power to suspend a sentence in part and to grant probation to begin after service of part of the sentence. *United States* v. *Wittmeyer,* 16 F. Supp. 1000 (D. Nev.).

Assuming, as some courts have stated, *White* v. *Burke,* 43 F. (2d) 329 (C. C. A. 10th); *United States* v. *Praxulis,* 49 F. (2d) 774 (W. D. Wash.); *Archer* v. *Snook,* 10 F. (2d) 567 (N. D. Ga.), that under the reasoning of the *Murray* case such a division of one sentence would interfere with parole in a manner Congress did not intend, it does not follow that the sentences on several counts to run consecutively in the *Greenhaus* case are the same as one sentence on one count of one indictment for purposes of the Probation Act. Cases holding that for purposes entirely different from the Probation Act separate sentences are treated as one sentence, such as *United States ex rel. Mignozzi* v. *Day,* 51 F. (2d) 1019 (C. C. A. 2d), and *Thompson* v. *United States,* 204 Fed. 973 (C. C. A. 9th), relied upon by the court below in the *Greenhaus* case, are not applicable. In other situations sentences on separate counts or separate indictments are treated as separate and distinct sentences. *In re Mills,* 135 U. S. 263; *In re Henry,* 123 U. S. 372; *Nashimoto* v. *Nagle,* 44 F. (2d) 304 (C. C. A. 9th); *Johnson* v. *United States ex rel. Pepe,* 28 F. (2d) 810 (C. C. A. 2d); *Ex parte Farlow,* 272 Fed. 910 (D. C. N. D. Ga.); *United States* v. *Blaisdell,* 3 Benedict 132, Fed. Cas. No. 14608 (S. D. N. Y.).

No reason appears from the language or purpose of the Probation Act to warrant limiting its operation by applying a rule that separate sentences on different counts or on different indictments are to be treated as one sentence. Indeed, where such a

result is intended for purposes of computing commutation of sentence (18 U. S. C., Sec. 710) or eligibility for parole (18 U. S. C., Sec. 714) Congress has expressed that intention. In the absence of such expression in the Probation Act suspended sentences on different counts or indictments should be treated as separate sentences.

Nothing in *United States* v. *Murray, supra,* suggests that sentence on one indictment may not be suspended and probation granted to begin at the expiration of a sentence on another indictment. This Court held that the power to suspend a sentence and grant probation ceased at the moment imprisonment began on that sentence. This Court relied upon the consideration that the power of parole operates during the period of imprisonment, and upon the consideration that a purpose of the Probation Act was to permit rehabilitation of first offenders without requiring them to suffer the evils of incarceration, as the basis for the conclusion that Congress did not intend that probation could be granted on a sentence after the offender began to serve it and thus came under the power of parole. No overlapping or interference of the complementary powers of probation and parole occurs here because the power of probation was exercised before imprisonment and before the power of parole could arise.

The consideration that one purpose of the Probation Act was to promote the rehabilitation of first offenders without imprisonment is not a suffi-

cient basis for a conclusion that if any imprisonment is required on one indictment no probation may be granted on another indictment for a connected or related offense. Probation in connection with imprisonment may exercise a beneficent control over offenders. No reason suggests that the benefits of the Probation Act are to be restricted to cases in which no imprisonment is ordered or to offenders who have never been imprisoned. Certainly the trial courts have power under the Probation Act to place on probation one who has been imprisoned for a former offense.

The language, history, and humanitarian purpose of the Probation Act support the construction, conducive to its flexible administration, that it permits the practice of suspending sentence on one indictment, or one count of an indictment, to begin at expiration of sentence on another indictment, or another count. Therefore, the order of probation was valid.

II

THE ORDER PURPORTING TO REVOKE THE ORDER OF PROBATION AND TO TERMINATE THE PROCEEDINGS AGAINST THE PETITIONER WAS VOID FOR WANT OF JURISDICTION

The court below correctly held that the sentencing judge had no power to revoke the order of probation and to terminate the proceedings when, twenty months after his service in the Southern District of New York was completed, he assumed

the jurisdiction to act as a court for the Southern District of New York while sitting in the Eastern District (R. 154).

The sentencing judge retained no jurisdiction to revoke probation under either Judicial Code, Sec. 18, as amended (28 U. S. C., Sec. 22), or the Probation Act, the only sources of power in this matter.

1. Judicial Code, Sec. 18, as amended by the Act of September 14, 1922, c. 306, Sec. 5, 42 Stat. 839, provides in part:

> Any designated and assigned judge who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to *decide* all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; * * *.

The power granted by this section is limited to motions for new trials and to acts required to be performed in order to prepare for appellate review any case tried by the assigned judge, which are not involved here, and to decisions on "all matters which have been submitted to him within such district." This provision grants power to perform functions merely incidental and supple-

mentary to duties undertaken and performed by the assigned judge while present and acting in the designated district. No power to initiate any proceeding is given. No power is granted to hear or decide any matter not submitted to him in the designated district even though it may be a matter in a case tried or heard by him in the designated district.

The limited extent of this power is indicated by its evident purpose, which is to permit the designated judge, after he has left the district and his designation has expired, to decide matters submitted to him within the designated district and perform those incidental procedural functions which no other judge, unfamiliar with the case, could so easily perform.

The cases which consider the validity of orders made by a designated judge after expiration of his designation and after his departure from the district, in a case he has heard or tried in the district, illustrate the purely incidental and supplementary nature of these permissible judicial acts. *Clarke* v. *Chicago, B. & Q. R. Co.,* 62 F. (2d) 440 (C. C. A. 10th); *United States* v. *Goldstein,* 271 Fed. 838 (C. C. A. 8th); *Apgar* v. *United States,* 255 Fed. 16 (C. C. A. 5th); *Hicks* v. *United States Shipping Board Emergency Fleet Corporation,* 14 F. (2d) 316 (S. D. N. Y.); *Gay* v. *Hudson River Electric Power Co.,* 190 Fed. 812 (C. C. N. D. N. Y.); *Cheesman* v. *Hart,* 42 Fed. 98 (C. C. Colo.).

2. Revocation of the order of probation and discharge of the probationer from further supervision was not a decision by Judge Inch on a "matter submitted to him within such district" in virtue of the probation power of the trial court under the Probation Act. The matter submitted to Judge Inch within the Southern District of New York under the Probation Act was the question whether probation should be granted in view of the nature of the offense and the individual situation of the offender at that time. The order granting probation was the decision on the matter submitted to Judge Inch under the Probation Act within the Southern District of New York.

The motion to discharge the defendant from probation raised for the first time in the Eastern District of New York new matters under the Probation Act which were not before Judge Inch when he granted probation. The motion for discharge presented the question of the defendant's conduct during probation and the need for further supervision. In this case it also presented the contention that the defendant was suffering from angina pectoris and that the probationary status had produced a mental condition (R. 28–29).

Revocation of probation is a summary proceeding which may be conducted in a wholly different manner from the trial in which the defendant is convicted or enters a plea of guilty or *nolo contendere*. *Escoe* v. *Zerbst*, 295 U. S. 490, 493; *Burns*

v. *United States,* 287 U. S. 216, 222–223; *Pritchett* v. *United States,* 67 F. (2d) 244 (C. C. A. 4th); *United States* v. *Antinori,* 59 F. (2d) 171 (C. C. A. 5th); *Jianole* v. *United States,* 58 F. (2d) 115 (C. C. A. 8th); *United States ex rel. Grossberg* v. *Mulligan,* 48 F. (2d) 93 (C. C. A. 2d); *United States* v. *Gargano,* 25 F. (2d) 723 (E. D. La.); *Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d); *Riggs* v. *United States,* 14 F. (2d) 5, 12 (C. C. A. 4th), certiorari denied, 273 U. S. 719; 36 Ops. A. G. 186, 190.

The Probation Act provides that the *court* shall have power to grant probation, that the *court* may revoke or modify probation, and that the *court* may discharge the probationer from further supervision. Probation may be granted (*Ackerson* v. *United States,* 15 F. (2d) 268 (C. C. A. 2d)) or revoked (*United States* v. *Greenhaus,* 14 F. Supp. 368 (S. D. N. Y.)) by any judge of the trial court and not solely by the judge who imposed the sentence.

The difference between the facts considered when probation is granted and the facts considered when probation is revoked and the probationer discharged, and the difference between the court proceeding in which probation is granted and the summary proceeding in which probation may be revoked by a judge of the trial court who did not grant the probation, indicate that when a designated judge grants probation the revocation of pro-

bation and discharge of the probationer is not a matter "submitted to him within such district" within Judicial Code Section 18, as amended.

3. In the Probation Act Congress gave the trial court complete supervision over the probationer for the probation period and also for the period of the maximum sentence which might have been imposed. The purpose of probation is the continuance of the trial court's close supervision over the offender in order to assist his rehabilitation. *Burns* v. *United States,* 287 U. S. 216, 222. The jurisdiction of the trial court over the case and over the offender after probation is granted is continued until changed conditions brought to the court's attention require revocation of probation or discharge of the probationer from further supervision or until the maximum period of supervision expires. *United States* v. *Antinori,* 59 F. (2d) 171, 172 (C. C. A. 5th).

Section 4 of the Probation Act, as amended (18 U. S. C., Sec. 727) indicates this detailed supervision over the probationer by providing that the probation officer shall keep informed concerning the conduct and condition of each probationer under his supervision, shall report thereon to the court placing such person on probation, shall use all suitable methods to aid the probationer, and shall keep records of his probation work.

The exclusive character of the trial court's jurisdiction over the probationer is indicated by the fact that he may not be arrested and tried for a crimi-

nal offense by a State court during the period of his probation. *Grant* v. *Guernsey*, 63 F. (2d) 163 (C. C. A. 10th), certiorari denied, 289 U. S. 744; *Dillingham* v. *United States*, 76 F. (2d) 35 (C. C. A. 5th).

This complete supervision of the probationer by the trial court is impaired in a manner Congress did not intend if an assigned and designated judge from another district, who sentences an offender and grants probation, may discharge the probationer after his designation has expired and after he has returned to his own district.

The present case is an illustration of the manner in which such a practice may impede proper administration of the Probation Act. Long after he returned to his own district the judge entertained an application in his chambers and outside of the district of the trial court to determine whether the probationer should be discharged. Neither the probation officer who was required by the Probation Act to report to the court in which the offender was placed on probation nor the United States Attorney for that district (R. S., Sec. 771, 28 U. S. C., Sec. 485) had any power to represent the United States in a proceeding to discharge the probationer outside of the district for which they were appointed. Inconvenience in the administration of the Probation Act will be caused if the United States Attorney, who conducted the trial in which probation was granted, and the probation of-

ficer, who has knowledge of the conduct of the probationer, may be required to attend a discharge proceeding outside of the district where the records of the trial and the probation officer's records are kept.

These considerations support the conclusion that Judge Inch lacked jurisdiction to make the order dated December 16, 1935, which purported to revoke the order of probation and to discharge the probationer from further supervision and that, therefore, that order of revocation and discharge was void.

III

EVEN ASSUMING THE JURISDICTION OF THE TRIAL JUDGE TO MAKE THE ORDER PURPORTING TO DISCHARGE PETITIONER FROM SUPERVISION, THAT ORDER DID NOT RELEASE THE PETITIONER FROM THE JURISDICTION OF THE TRIAL COURT TO IMPOSE SENTENCES ON TWO INDICTMENTS

The order signed by Judge Inch provided that the order of probation "be, and the same is hereby, revoked, and the defendant is discharged from further supervision, and the proceedings against him in this cause be, and the same are hereby, terminated" (R. 29).

Assuming for this argument that Judge Inch had the power to discharge the petitioner from the probation which he had granted, the order of discharge served only to discharge the petitioner from probationary supervision, and did not release the

petitioner from the jurisdiction of the trial court over the petitioner for the period after the termination of probation and until the end of the maximum period to which he might have been sentenced.

It is clear that under Section 2 of the Probation Act the trial court has jurisdiction of the offender after the period of probation and until the expiration of the maximum period for which he might have been sentenced. *Burns* v. *United States,* 287 U. S. 216, 221; *United States ex rel. Grossberg* v. *Mulligan,* 48 F. (2d) 93 (C. C. A. 2d); *Hollandsworth* v. *United States,* 34 F. (2d) 423 (C. C. A. 4th). After the period of probation has expired the defendant may be brought before the court and required to serve a sentence. *Mason* v. *Zerbst,* 74 F. (2d) 920 (C. C. A. 10th). Even after the court expressly discharges the defendant from probation he may be brought before the court and be sentenced within the time of the maximum sentence which might have been given to him originally. *Crowder* v. *Aderhold,* 46 F. (2d) 357 (N. D. Ga.).

In the present case the order discharging the petitioner from probationary supervision ordered that the proceedings against him be terminated. Section 2 of the Probation Act provides that the trial Court may "discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable." This provision may be

construed as giving the trial court the power to terminate only the proceedings of probationary supervision, but leaving jurisdiction in the trial court to recall the offender at any time within the period of maximum sentence. This provision may be given the broader construction which would permit the trial court to terminate the entire proceedings so completely that no further action could be taken against the defendant. *United States* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5th); *United States* v. *Maisel*, 26 F. (2d) 275 (S. D. Tex.).

The order of revocation in the present case states that "the proceedings" are terminated. It does not indicate beyond any doubt which effect Judge Inch intended. It was signed during the probation period, and the facts recited as the basis for the order indicate that release from probationary supervision was the principal purpose of the application. It does not expressly indicate that the proceedings terminated included any possible proceeding after the period of probation expired. The order does not refer to all proceedings or the entire proceedings. If it had been signed after probation had expired, as in *United States* v. *Maisel, supra*, it would be clearer that the general reference to "the proceedings" meant all proceedings after expiration of probation.

Judge Inch's remarks on the hearing to resettle his order of revocation (R. 46, 47, 58) and his conclusion that the word "probationary" should ap-

pear before the word "proceedings" in that order (R. 65) show clearly that a termination of the trial court's jurisdiction was not intended.

Any doubt as to the meaning of the order should prevent a construction entirely terminating the district court's *jurisdiction.* The court had jurisdiction before this order was signed. Very clear language should be required to terminate that jurisdiction.

This construction to the effect that the order did not discharge all proceedings after expiration of probation is supported by the consideration that the order was made by the assigned judge after he left the district. Although he might believe that he still had power to terminate a probation he had granted, it is not to be assumed that he intended to go further than the application absolutely required and terminate the jurisdiction of the court entirely.

IV

IF THE ORIGINAL ORDER OF PROBATION IS INVALID THE MOTION FOR SENTENCE ON THE TWO UNSATISFIED PLEAS OF GUILTY SHOULD HAVE BEEN GRANTED BY THE DISTRICT COURT

The court below properly observed that even though the original order of probation on the two indictments was illegal, the district court had power to impose sentence. *Miller* v. *Aderhold,* 288 U. S. 206.

The trial court is under a duty to impose sentences if the order suspending imposition of sen-

tences and granting probation is invalid. *Ex parte United States,* 242 U. S. 27, 41–42.

The fact that the petitioner has served the sentence on one indictment does not render void or satisfy the requirement for sentences on the other two wholly separate indictments. Such sentences are not additional sentences on the plea of guilty to the first indictment, but are required by the two separate pleas of guilty to the other two indictments.

CONCLUSION

The judgment of the court below properly remanded the petitioner to custody for a determination whether probation should be revoked and sentences imposed on the two indictments. Therefore, that judgment should be affirmed.

Respectfully submitted.

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NOVEMBER 1937.

APPENDIX

The statutes involved are printed in the appendix to the petitioner's brief. The following table has been prepared for the Annual Report of the Attorney General for the fiscal year ending June 30, 1937:

TABLE 2G.—*Type of sentence of convicted defendants in criminal cases, by offense, fiscal year 1937*

Offense	Total	Imprisonment only	Imprisonment and Fine	Fine only	Probation or suspended sentence				
					Entire sentence probated	Punishment followed by probation			Other [1]
						Imprisonment only	Imprisonment and fine	Fine only	
Counterfeiting and forgery	2,148	634	689	13	441	197	126	34	13
Customs Act violations (not elsewhere classified)	289	114	9	38	74	39	7	7	1
Embezzlement and fraud	431	216	43	27	78	41	17	7	2
Escape, flight, and mutiny	124	92	8	4	14	.....	2	.....	4
Extortion and racketeering	6	4	.....	.....	2	.....	.....	.....	.....
Immigration Act violations	4,278	2,679	71	8	288	1,176	37	4	15
Internal Revenue Act violations (not elsewhere classified)	123	3	20	33	33	4	8	19	1
Interstate Commerce Act violations	102	4	3	61	27	.....	1	6	.....
Kidnaping	61	49	6	.....	1	1	4	.....	.....
Larceny:									
National Motor Vehicle Theft Act violations	1,730	1,180	105	3	273	135	17	11	6
National Stolen Property Act violations	16	6	1	.....	7	1	.....	.....	1
Theft from interstate commerce	652	409	60	7	98	48	23	6	1
Theft or illegal possession of Government property	347	191	16	8	87	34	5	6	.....
Not otherwise specified	1	.....	.....	.....	1	.....	.....	.....	.....
Liquor law violations:									
Customs Act violations	121	69	5	5	27	5	2	8	.....
Indian Liquor Law violations	1,143	39	763	16	218	13	62	30	2
Internal Revenue Act violations	20,162	4,332	6,085	767	4,703	1,578	1,895	663	139
Prohibition Act violations	15	1	3	.....	3	4	4	.....	.....
Not otherwise specified	109	10	12	26	31	5	5	30	.....
Narcotic Drug Act violations	2,450	1,246	537	50	306	210	53	35	14

[1] Includes convicted defendants with sentences deferred, continued without day, etc., and those sentenced to immediate deportation.

TABLE 2G.—*Type of sentence of convicted defendants in criminal cases, by offense, fiscal year 1937*—Continued

Offense	Total	Imprisonment only	Imprisonment and Fine	Fine only	Probation or suspended sentence				
					Entire sentence probated	Punishment followed by probation			Other
						Imprisonment only	Imprisonment and fine	Fine only	
National Bank and Federal Reserve Act violations	371	120	22	11	152	54	4	7	1
National bank robbery	75	49	18	----	3	5	----	----	----
National Bankruptcy Act violations	128	54	8	5	38	19	2	2	----
National Firearms Act	18	7	----	7	3	----	----	----	1
Postal law violations:									
Burglary	211	97	68	1	27	7	9	1	1
Counterfeiting and forgery	171	100	7	1	51	9	2	----	1
Embezzlement	320	109	21	10	104	58	10	7	1
Fraud	514	227	54	26	88	88	14	9	8
Larceny	550	309	48	1	117	55	14	2	4
Lottery promotion	34	----	2	5	20	5	----	2	----
Mailing obscene matter	118	39	3	4	50	15	3	4	----
Robbery	56	49	1	----	5	1	----	----	----
Other and not specified	260	120	8	14	71	28	7	7	5
White Slave Traffic Act violations	523	363	64	4	49	32	2	5	4
Miscellaneous Federal offenses:									
Food and Drug Act violations	351	1	----	313	24	1	1	4	7
Migratory Bird Act violations	533	36	9	424	52	3	2	1	6
Naturalization Law violations	127	57	30	7	41	3	----	6	3
Vessel Safety Regulations Act violations	209	----	----	203	6	----	----	----	----
War Risk Insurance Act violations	78	11	6	9	28	9	7	8	----
Offenses occurring in the District of Columbia, Territories, Indian, military, and other Government reservations (not elsewhere classified):									
Assault	264	181	9	6	57	6	1	3	1
Burglary	547	459	----	----	88	----	----	----	----
Criminal homicide	49	40	2	1	----	2	----	----	4
Larceny	692	429	11	2	230	14	2	4	----
Robbery	349	312	----	----	37	----	----	----	----
Sex offenses	66	51	----	----	12	3	----	----	----
All other offenses	334	129	9	76	103	12	1	1	3
All other offenses	705	157	137	170	138	56	24	14	9
Total	41,961	14,786	8,953	2,368	8,305	3,976	2,373	943	257

U. S. GOVERNMENT PRINTING OFFICE, 1938

SUPREME COURT OF THE UNITED STATES.

No. 87.—October Term, 1937.

William D. Frad, Petitioner,
vs.
John J. Kelly, United States Marshal for the Southern District of New York, United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 6, 1937.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner pleaded guilty to three indictments in the District Court for the Southern District of New York. Judge Inch, a district judge of the Eastern District of New York, who had been designated and assigned to sit in the Southern District, pursuant to R. S. 591, as amended,[1] received the pleas and imposed a sentence under the first indictment (No. C 96-116) of two years' imprisonment and $1,000 fine. Under the other indictments he made identical orders: "Imposition of sentence suspended. Probation for four years to begin after serving sentence on C 96-116. Subject to the standing probation orders of this Court." The petitioner paid his fine and served his sentence and thereupon entered upon his period of probation.

Twenty months after Judge Inch had returned to his own district, application was made to him at chambers, to discharge the petitioner from probation and to terminate the proceedings against him, pursuant to Section 2 of the Probation Act of March 4, 1925.[2] The judge directed that notice of the application be given to the probation officer of the Southern District of New York. This was done and, after a hearing on the merits in the Eastern District, at which the probation officer was present and took part, Judge Inch entered an order revoking the probation, discharging the petitioner from further supervision and terminating the proceedings against him. The order was captioned in the "United States District

[1] U. S. Code, Title 28, § 17.
[2] U. S. Code, Title 18, § 725.

Court for the Southern District of New York" and was filed in the office of the clerk of that court.

About a year later, on a petition by the probation officer of the Southern District, a judge sitting in that district authorized a warrant for the petitioner's apprehension upon a charge of violation of the terms of his probation. The petitioner was arrested and admitted to bail pending a hearing.

Thereafter the United States Attorney for the Southern District moved to vacate the order of Judge Inch terminating the probation and the proceedings. By stipulation of counsel, Judge Inch returned to the Southern District to hear the parties upon this motion but he entered no order since, meantime, the petitioner had surrendered himself to the marshal and sought a writ of *habeas corpus,* and the United States Attorney had moved before a judge sitting in the Southern District that the petitioner be sentenced on the two indictments under which sentence had been suspended.[3] The petition for the writ and the motion for sentence were heard together; the petition was granted, and the motion was denied. The Circuit Court of Appeals reversed and remanded the cause "for the consideration of the revocation of [the petitioner's] probation and for sentence if warranted."[4]

We granted the writ of certiorari because of the importance of the questions presented in the administration of the Probation Act. We hold that the judgment of the court below was right.

First. The contention that the trial court was without power to suspend the imposition of sentences on the pleas of guilty to two of the indictments and place the defendant on probation effective after completion of service of sentence on the third indictment is without merit. Based upon this contention the petitioner says that when he had completed service of the sentence imposed on indictment C 96-116 there remained no sentence against him and the term having long since expired the court was without power then to impose one.

The Probation Act (*supra*) provides, in Section 1, that United States courts having original jurisdiction of criminal actions, being

[3] In fact there were two motions. The one was for sentence on the two indictments. This apparently was not pressed. The other was for an order committing the petitioner "for the period of the unserved portion of his sentence . . . to wit, four years in a place to be designated by the Attorney General of the United States, and for such other, further, and different relief as to the court may seem just and proper."

[4] 89 F. (2d) 866.

satisfied that the ends of justice and the best interests of the public and of the defendant will be served thereby, shall have power, after conviction for any crime or offense not punishable by death or life imprisonment, "to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best," or to impose a fine and place the defendant upon probation; to revoke or modify any condition of probation or change the period thereof, provided that the period with any extensions shall not exceed five years. The act was intended to cure the lack of power indefinitely to suspend a sentence, under which district courts labored prior to the enactment.[5]

The second section provides that at any time within the probation period, or at any time after the probation period but within the maximum period for which the defendant might originally have been sentenced, the probationer may be summoned before the court and "the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." The action of the trial court in suspending sentence and imposing probation on two of the indictments was in strict accordance with the authority thus explicitly conferred. The validity of the cited provisions is not open to question.[6] The mere fact that a sentence of a fine and imprisonment had been imposed upon one of the indictments in no way militated against the prescription of probation in respect of the plea of guilty under the other two.[7]

Second. The order of Judge Inch, sitting in the Eastern District, after the termination of his service in the Southern District, was null. The statute providing for designation and assignment of a district judge to sit temporarily in another district than his own does not authorize the order, and the express provisions and obvious intent of the Probation Act negate the power of any judge, other than a judge of the Southern District of New York, to make it.

The Act of March 3, 1911, Section 18, as amended,[8] provides: "Any designated and assigned judge who has held court in another

[5] Ex parte United States, 242 U. S. 27.
[6] Escoe v. Zerbst, 295 U. S. 490, 492.
[7] Compare Burns v. United States, 287 U. S. 216.
[8] U. S. Code, Tit. 28, § 22.

district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, to decide all matters which have been submitted to him within such district, to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; . . . ."

When an assigned judge has presided at the trial of a cause, he is to have power, though the period of his service has expired, and though he may have returned to his own district, to perform the functions which are incidental and supplementary to the duties performed by him while present and acting in the designated district. And where a cause has been submitted to him in the designated district, after his return to his own district he may enter decrees or orders and file opinions necessary to dispose of the case, notwithstanding the termination of his period of service in the foreign district. But the Act goes no farther. It clearly does not contemplate that he shall decide any matter which has not been submitted to him within the designated district. A criminal trial is concluded by the judgment of sentence entered upon a plea or a verdict of guilt. By express provision of the statute an assigned judge may thereafter, notwithstanding the expiration of his term of service, hear a motion for a new trial and do all things necessary to prepare a record for an appellate court but no authority is given to hear a new matter even though that new matter may arise in the same case. An application for the termination of the probation and the proceedings against a defendant constitutes a new matter, submission of which may not be made to the assigned judge after his return to his own district. The appropriate place for its presentation is the court in which the judgment of conviction and the sentence is recorded. In the absence of express authorization no power to deal with such an application is vested in any other court.

All the relevant provisions of the Probation Act refer to the court in which the guilt of the defendant was determined and sentence imposed. The first section empowers the court having jurisdiction of the action to place the defendant upon probation, and to revoke or modify the conditions of the probation.

The second requires the probation officer, when directed by the court, to report to the court as to the conduct of the probationer; authorizes the court either to discharge the probationer from further supervision or to terminate the proceedings against him or to extend the period of probation, to issue a warrant, upon a proper showing, for the probationer's arrest and, upon a hearing, to revoke the probation or the suspension of sentence and to impose a sentence which might have originally been imposed. Section three authorizes the judge of any United States court to appoint one or more suitable persons as probation officers "within the jurisdiction and under the discretion of the judge making such appointment or of his successor." Section four places upon a probation officer the duty to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court, and such other duties as the court may direct.

Thus the trial court has complete supervision over the probationer for the period of his probation and for the term of the maximum sentence which might have been imposed. This jurisdiction is vested in the trial court and in no other. To hold that a judge of another district, merely because he had temporarily sat at the trial and conviction of a defendant and imposed sentence, could, from that other district supervise, extend, modify or terminate the probation, would be to ignore the intent of the law. It would moreover result in confusion and inconvenience in the administration of the probation act. It would mean that the United States Attorney and his assistants, and a probation officer of the court in which the judgment is recorded, would be required to go to distant parts to be heard upon the merits of any application by the probationer and that the probationer, at his will, could institute proceedings either before a judge of the court in which his conviction is recorded or the judge in a different district who had been a temporary member of that court. Such a possibility was certainly never intended. Probation is a system of tutelage under the supervision and control of the court which has jurisdiction over the convicted defendant, has the record of his conviction and sentence, the records and reports as to his compliance with the conditions of his probation, and the aid of the local probation officer, under whose supervision the defendant is placed. This jurisdiction is not divided between that court and a distant judge who sat by designation at the defendant's trial.

Third. What has been said indicates the answer to petitioner's argument that the probation officer of the Southern District, by appearing before Judge Inch in the Eastern District upon the application for termination of the proceedings, and the United States Attorney, by stipulating that Judge Inch might return to the Southern District to hear a motion for resettlement of his order, have waived venue or are estopped to question it. Neither of these officers could confer jurisdiction upon a designated judge to perform acts not authorized by the assignment Act outside the district of designation after his term of service had ended. They could not waive the jurisdictional requirements of the Probation Act or by their conduct confer jurisdiction on a judge of another district to act for the trial court in which alone the statute vests the power to deal with the subject.

The judgment is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.